Supreme Court, U.S.
FILED
APR 3 1996
CLERK

(3)

No. 95-1320

In The

Supreme Court of the United States

October Term, 1995

MITCHELL J. BROWN AND
HOWARD E. RUDOLPH,

Petitioners,

vs.

JOSEPH PASKVAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

SHARON SOBOL JORDAN
Director of Law

ROBERT JOSEPH LALLY
Counsel of Record

City of Cleveland
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

Attorneys for Petitioners
Mitchell J. Brown and
Howard E. Rudolph

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 266 (1977) 3, 4

Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982) 2, 3

Hicks v. St. Mary's Honor Center, 509 U.S. 502 (1993) 3

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 3

ARGUMENT

According to the Respondent Paskvan's statement of the case, the Petitioners' decision not to promote him to the rank of sergeant was "suspect" because Petitioners promoted candidates numbers one through fifty on Paskvan's eligible list except for Paskvan and it was unusual for promotions not to be made according to rank. However, Paskvan has failed to create any issue regarding the race of those promoted at the time he was not granted the discretionary promotion. Instead, Paskvan argues that the race of peripheral persons, including minority persons, who protested against his conduct, are a legitimate basis for his claim of race discrimination. Thus, Paskvan concedes that no minority persons promoted from Paskvan's eligible list were less qualified than Paskvan.

Paskvan essentially concedes that he has not presented proof of a similarly situated minority officer, and in fact maintains that no such proof was required.[1] The linchpin of Paskvan's argument is that the Petitioners' consideration of minority citizen protests in making the

---

[1] While Paskvan preliminarily argues that Officers Tolliver and Gingell are similarly situated, it is undisputed that neither of these officers was on Paskvan's eligible list and neither was promoted in Paskvan's place. Further, Paskvan was involved in nine shootings whereas Tolliver was involved in two shootings and Gingell was involved in one shooting. Moreover, the fact that Paskvan relies on one white officer, Gingell, and one black officer, Tolliver, as his "comparables" reveals that Paskvan is not relying on a similarly situated minority co-worker to state his claim, but on the race of peripheral persons. In fact, the second pillar of Paskvan's argument is that Paskvan was not required to prove that similarly situated minority police officers were treated differently than Paskvan.

discretionary decision not to promote Paskvan constituted evidence of race discrimination. Paskvan's case must stand or fall based on the viability of that theory, and Paskvan has not presented any authorities which support that theory.

As expected, Paskvan relies on *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982). However, Paskvan fails to address Petitioners' argument that the Seventh Circuit Court's holding in *Ciechon* was that the plaintiff's due process rights were implicated when the defendant city reacted to the threat of adverse publicity by misusing its disciplinary procedures against the plaintiff. In this case, Petitioners prevailed at trial on Paskvan's due process claim.

Paskvan is content to note that a *prima facie* case of denial of equal protection was also stated in *Ciechon* without further explanation. However, the basis of the equal protection violation noted in *Ciechon* was that there was invidious discrimination against the plaintiff on the basis of sex because she was treated differently than a similarly situated male paramedic when she was disciplined. Paskvan concedes that he has not produced a similarly situated minority officer, and therefore Paskvan has failed to state a *prima facie* case of denial of equal protection based on race according to the rule of law stated in *Ciechon*.

Although Paskvan argues that there is direct evidence of race discrimination according to *Ciechon* because minority citizen complaints influenced the Petitioners' decision not to promote him, that is certainly not the holding of *Ciechon*. In this case, the Petitioners did not

discipline Paskvan, but rather exercised official discretion in not granting Paskvan a promotion. Paskvan has no legitimate claim for denial of due process rights based on *Ciechon* because the Petitioners never misused disciplinary procedures against Paskvan, as noted in his brief in opposition. Further, Paskvan has no legitimate claim for denial of equal protection rights based on *Ciechon* because he has not shown that the Petitioners treated him differently than a similarly situated minority candidate for sergeant. Simply put, *Ciechon* presents the most analogous set of facts of all cases cited by Paskvan, and Paskvan fails to state a *prima facie* case within the meaning of *Ciechon*.

While Paskvan claims that he has presented direct evidence of race discrimination, his reliance on *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 266 (1977), and *Hicks v. St. Mary's Honor Center*, 509 U.S. 502 (1993), indicates that Paskvan's case is circumstantial at best. Paskvan misreads *Hicks*, in which this Court held that a fact finder's rejection of the employer's proffered reason for an employment decision does not entitle the plaintiff to judgment. Paskvan's reliance upon *Arlington Heights* is a ploy to elevate the importance of circumstances surrounding the decision not to promote Paskvan, especially the race of certain citizens opposing his promotion, above the more immediate and essential determination of whether a less qualified minority candidate for promotion to sergeant was promoted instead of Paskvan. Paskvan's reliance upon *Hicks* and *Arlington Heights* is merely an "end around" in denigration of the well established paradigm of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which provides that, absent

direct evidence of race discrimination, Paskvan must establish a *prima facie* case of race discrimination including proof that similarly situated minority candidates for sergeant were treated differently than Paskvan.

Finally, Paskvan's alleged indirect evidence of race discrimination does not pass muster according to the factors outlined in *Arlington Heights* for the same reasons that his alleged direct evidence does not pass muster. Whether the evidence of the influence of minority citizen complaints on the Petitioners' discretionary decision not to promote Paskvan is semantically described as direct evidence or circumstantial evidence, this ultimate evidence on which Paskvan's case must stand or fall is legally insufficient to establish a claim for denial of equal protection based on race.

CONCLUSION

Based on the foregoing, it is respectfully requested that a Writ of Certiorari should be granted.

Respectfully submitted,

SHARON SOBOL JORDAN
Director of Law

ROBERT JOSEPH LALLY
Assistant Director of Law
Counsel of Record

City of Cleveland
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

Attorneys for Petitioners
Mitchell J. Brown and
Howard E. Rudolph